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June 17, 2002

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Christine Todd Whitman, Administrator
U.S. Environmental Protection Agency
Mailcode 1101A
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Dakota Resource Council's Notice of Intent to Sue EPA for Failing to Require North Dakota to Stop Sulfur Dioxide Violations in North Dakota and Montana Class I Areas

Dear Ms. Whitman:

I am writing on behalf of the Dakota Resource Council (DRC) to notify you of DRC's intent to file suit against the EPA for failing to perform its mandatory duty under the Clean Air Act to issue immediately a SIP call to North Dakota pursuant to 42 U.S.C. § 7410(k)(5) to stop ongoing violations of ambient sulfur dioxide (SO₂) PSD increments in North Dakota and Montana Class I areas. The Class I areas adversely affected by EPA's failure to act include the Theodore Roosevelt National Park and the Lostwood Wilderness Area in North Dakota, and the Medicine Lakes Wilderness Area and Fort Peck Indian reservation in Montana. **Attachment 1.**

Pursuant to the citizen suit provision of the Clean Air Act at 42 U.S.C. § 7604, citizens are authorized to sue the Administrator of EPA for failing to perform any non-discretionary act or duty under the Clean Air Act. As required by the citizen suit provision of the Clean Air Act, I therefore am writing to notify you that unless this matter is otherwise fully resolved, DRC intends to file suit against you in the applicable court to enjoin the violations described below.

I. THE MANDATORY DUTY TO PREVENT SIGNIFICANT DETERIORATION

A. PSD Increments

The 1977 amendments to the Clean Air Act established a prevention of significant deterioration (PSD) program. The purpose of the PSD program, as its name suggests, is to ensure that the quality of air in our country does not significantly deteriorate. To meet this

objective, the Clean Air Act at 42 U.S.C. § 7471 mandates that each state develop a state implementation plan (SIP) that includes all appropriate measure to prevent the quality of its air from deteriorating:

each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 107 as attainment or unclassifiable.

This requirement is mirrored in the federal PSD regulations at 40 C.F.R. § 51.166(a)(1).

To protect air quality in clean air areas Congress decided that ambient levels of pollution would only be allowed to increase over baseline concentrations by very small increments. Thus the genesis of "PSD increments." Class I areas, including national parks and wilderness areas, have the most protective – and thus smallest allowable – PSD increments. Pursuant to 42 U.S.C. § 7473(a) and (b), each state with a Class I area is required to ensure that PSD increments for that area are not exceeded. The allowable PSD increment over baseline ambient levels of SO₂ in any Class I area is two micrograms of SO₂ per cubic meter on an annual geometric mean, five micrograms per cubic meter on a twenty-four-hour maximum basis, and 25 micrograms per cubic meter on a three hour maximum basis. Id.

B. State and Federal Responsibilities to Protect PSD Increments

Each state with one or more Class I areas, such as North Dakota, is required to protect the PSD increment, and to determine periodically whether any PSD increment is being violated. Specifically, 40 C.F.R. § 51.166(a)(4) provides:

The State shall review the adequacy of a [state implementation] plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

Once there is evidence showing that a PSD increment is being violated, the state – or, upon its failure the Administrator of EPA – is required to take action to stop the violation. Thus, pursuant to 40 C.F.R. § 51.166(a)(3),

If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

In the event that a state fails to correct any PSD increment violation, the Clean Air Act requires EPA to step into the breach. 42 U.S.C. § 7410(k)(5) mandates that:

Whenever the Administrator finds that the applicable implementation plan is substantially inadequate . . . to otherwise comply with any requirement of this Act, **the Administrator shall require the State to revise the plan** as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

Similarly the Clean Air Act at 42 U.S.C. § 7410(a)(2)(H)(ii) requires the North Dakota SIP to provide for mandatory SIP revision if EPA finds the SIP inadequate. 42 U.S.C. § 7410(a)(2)(D)(i)(II) also requires the North Dakota SIP to prohibit any North Dakota source of air pollution from interfering with any other state's obligation to prevent significant deterioration.

The mandatory duties described above that require EPA to require a state to revise its SIP at the time EPA finds that the SIP is substantially inadequate is referred to in this letter as a "SIP call."

II. EPA HAS FOUND SO₂ INCREMENT VIOLATIONS IN NORTH DAKOTA

DRC's suit will allege that EPA has determined there are ongoing, short-term (3 and 24 hour) SO₂ PSD increment violations in North Dakota and Montana, and that the North Dakota SIP is inadequate to prevent or correct these violations as required by 42 U.S.C. § 7471, 42 U.S.C. § 7473(a) and (b), 42 U.S.C. § 7410(a)(2)(H)(ii) and 42 U.S.C. § 7410(a)(2)(D)(i)(II). Because EPA has failed to issue a SIP call to North Dakota to correct these SO₂ increment violations, EPA is in violation of the Clean Air Act. 42 U.S.C. § 7410(k)(5). Evidence that EPA has determined there are PSD increment violations in North Dakota and Montana, and that the North Dakota SIP is inadequate includes, but is not limited to, the following:

On October 21, 1999, the North Dakota Department of Health (NDDH) submitted to EPA an analysis that showed, in the context of proposed increases in SO₂ emissions at the Milton R. Young lignite-fired power plant near Beulah, North Dakota, that there were existing violations of the short-term PSD increments for SO₂ in all of the Class I areas in North Dakota (Theodore Roosevelt National Park and the Lostwood Wilderness Area) and in two Class I areas in Montana (Medicine Lakes Wilderness Area and Fort Peck Indian reservation). **Attachment 2.** Thereafter EPA, in a February 1, 2000 letter to the NDDH, agreed with the state that increment violations had been established by the state, and that the state's modeling analysis that showed the violations was technically sound and consistent with EPA's modeling procedures and guidance. As a result, EPA suggested that the NDDH should adopt a SIP revision to correct the existing increment violations. EPA's February 1, 2000 letter, however, was not a SIP call and did not impose any deadline for the NDDH to correct the increment violations. **Attachment 3.**

Approximately a year later, EPA wrote to NDDH on March 28, 2001 expressing its concern that North Dakota had failed to address the PSD increment violations. **Attachment 4.** In this letter, EPA cited 40 C.F.R. § 51.166(a)(3) that requires North Dakota to revise its SIP to correct any increment violation. Further, EPA stated "Because we had information that these

Clean Air Act requirements were being violated, EPA contemplated issuing a SIP call to require North Dakota to revise its SIP.” EPA further stated that it would publish an information notice in the Federal Register “to inform the public of the process by which the State and EPA intend to address these increment violations; however, this information notice will not make the State’s commitments legally binding in any way.” EPA published such notice in the Federal Register on May 29, 2001. (66 Fed.Reg. 29127, epa.gov/fedrgstr/EPA-AIR/2001/May/Day-29/a13409.htm.) **Attachment 5.** Neither EPA’s March 28, 2001 letter nor EPA’s May 29, 2001 Federal Register notice was a SIP call.

On August 31, 2001, EPA again wrote to the NDDH, expressing its finding that SO₂ increment violations in North Dakota were continuing. **Attachment 6.** In the context of permitting requirements for a new lignite coal-fired power plant near Gascoyne, North Dakota, EPA referred to the uncorrected SO₂ increment violations as a “serious existing problem” and stated that “in this situation, the remedial SIP action must occur at the same time, or before, the permit [for the new power plant] is issued.” Again, EPA issued no formal SIP call.

Early in 2002, EPA confirmed its finding that the North Dakota SIP is inadequate to protect the PSD increments for SO₂. In January of 2002, EPA Region VIII developed an increment consumption analysis for the Class I areas of western North Dakota and eastern Montana. EPA’s analysis showed numerous violations of the SO₂ PSD increment in all of North Dakota’s Class I areas and in eastern Montana’s Class I areas. **Attachment 7.**

Finally, in a May 24, 2002 letter from EPA Region VIII to NDDH, EPA provided its comments on NDDH’s April 2002 revised modeling analysis that purported to show there were no PSD increment violations. **Attachment 8.** In its letter EPA stated:

It appears that the State’s proposed modeling effort needs revision since the State’s alternative methodologies have not been demonstrated to be more appropriate than the methodologies outlined in the Federal PSD program. As a result, it appears that this proposed modeling effort cannot be used to support the proposed conclusion in the hearing notice that the State Implementation Plan (or SIP) is adequate to prevent significant deterioration of air quality for affected Class I areas.

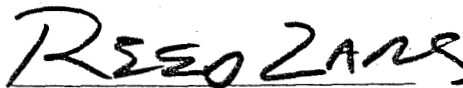
In spite of EPA’s many findings and determinations regarding long-standing SO₂ increment violations in North Dakota, EPA continues to fail to comply with its mandatory duty under the Clean Air Act to issue a SIP call to North Dakota.

III. CONCLUSION

EPA is responsible for ensuring that the PSD mandates of the Clean Air Act are met. EPA has determined on multiple occasions that the North Dakota SIP is inadequate because it has failed, and continues to fail, to ensure compliance with the PSD increments for SO₂ in Class I areas in North Dakota and Montana. Therefore EPA has failed to perform its mandatory duty, set forth at 42 U.S.C. § 7410(k)(5) and 40 C.F.R. 51.166(a)(3), to issue a SIP call immediately to North Dakota requiring that state to revise its SIP by a specific deadline.

The address of Dakota Resource Council is P.O. Box 1095, Dickinson, North Dakota 58602-1095. DRC has individual members who have been, and continue to be, injured by the excessive and unlawful levels of SO₂ in Class I areas in North Dakota. If you have any questions regarding the allegations in this notice, believe any of the foregoing information to be in error, or wish to discuss a settlement of this matter before or after the initiation of litigation, please contact me.

Yours Sincerely,



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- Attachment 1: Map showing Class I areas and SO₂ sources.
- Attachment 2: October 21, 1999 NDDH analysis, excerpts.
- Attachment 3: February 1, 2000 EPA letter to NDDH.
- Attachment 4: March 28, 2001 EPA letter to NDDH.
- Attachment 5: May 29, 2001 EPA Federal Register notice.
- Attachment 6: August 31, 2001 EPA letter to NDDH.
- Attachment 7: January of 2002, EPA Region 8 increment consumption analysis, excerpts.
- Attachment 8: May 24, 2002 letter from EPA to NDDH, excerpts.

cc: Robbie Roberts, Administrator
EPA Region VIII
999 18th Street, Suite 300
Denver, Colorado 80202-2466